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AUTHOR Henkel, Jane R.
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ABSTRACT

This information memorandum describes three federal laws which govern public access to federal records and the treatment of personally identifiable information by federal agencies or under federal programs. It is noted that these laws generally apply only to federal agencies in the executive branch of government. The first of four major sections of the memorandum provides background information on the purposes of, or concerns which led to the enactment of the three laws, and a brief summary of each law. Focusing on the Freedom of Information Act, the second section covers publication of information about policies and procedures, public inspection and copying of specified records, public inspection of all other records, exceptions, protection of privacy, indexes, fees, remedies, and reports to Congress. The third section describes the Privacy Act of 1974, including: records covered; exceptions; notice and opportunity to comment; record collection; instruction of personnel and other safeguards; record maintenance; disclosure; disclosure log; individual access and opportunity to challenge; agency rules--notice of disclosure, procedures for individual access and fees; restrictions on keeping records on the exercise of First Amendment rights; notice of subpoenaed records; selling or renting lists; social security numbers; civil remedies and criminal penalties; government contractors; reports; and the Privacy Protection Study Commission. The description of the Computer Matching and Privacy Protection Act of 1988 includes records covered, exceptions, matching agreement requirement and contents, notices of agreements, term of agreement, verification, opportunity to contest, limitations on disclosure and agreement renewal, data integrity boards, cost-benefit analysis, appeal of disapproval, and reports. (BBM)

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INFORMATION MEMORANDUM 90-21

One East Main Street, Suite 401
Madison, Wisconsin
Telephone: (608) 266-1304

By: Jane R. Henkel
Senior Staff Attorney
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GOVERNMENT RECORDS: FEDERAL LAWS RELATING TO FREEDOM OF INFORMATION, PRIVACY AND COMPUTER MATCHING

* *

INTRODUCTION

This Information Memorandum was prepared for the Special Committee on Privacy and Information Technology. It describes the three federal laws which govern (1) public access to federal records and (2) the treatment of personally identifiable information by federal agencies or under federal programs. Generally, these laws apply to federal agencies in the executive branch of government; Congress and the courts are specifically excluded from the definition of "agency" which applies to all of these laws [5 U.S.C. ss. 551 (1) and 552 (f)].

The three laws described in this Memorandum are:

1. The Freedom of Information Act, enacted in 1966 [P.L. 90-23].

2. The Privacy Act of 1974 [P.L. 93-579].

3. The Computer Matching and Privacy Protection Act of 1988 [P.L. 100-503].

These three closely-related laws are codified primarily in two contiguous sections of the United States Code: 5 U.S.C. ss. 552 and 552a. This Memorandum describes the Acts as amended to date.

Each of the laws described in this Memorandum is of general application. That is, each of these laws applies to all federal agencies in the executive branch and to all records covered by the law which are in the custody of the agency, regardless of the purpose for which the records were collected. In addition to these general laws, numerous other federal

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laws have been enacted to govern the access to, or to provide confidential treatment of, specific types of records collected for specific purposes or by specific agencies. None of these other laws is described in this Memorandum. Examples of these specific laws include the Tax Reform Act of 1976 [26 U.S.C. s. 6103]; the Intelligence Identities Protection Act of 1982 [P.L. 97-200]; the Debt Collection Act of 1982 [P.L. 97-365]; the Census Act [13 U.S.C. s. 9214]; the Social Security Act [42 U.S.C. s. 408 (h)]; and the Child Abuse Information Act [42 U.S.C. s. 5103 (b) (2) (E)].

This Memorandum does not discuss case law interpreting the three Acts nor attempt to evaluate their effectiveness. For citations to studies evaluating the Privacy Act of 1974, see Electronic Record Systems and Individual Privacy, prepared by the Congressional Office of Technology Assessment, June 1986, at pp. 16 to 17.

This Information Memorandum is organized as follows:

	Page
PART I - BACKGROUND; SUMMARY OF ACTS	5
A. Freedom of Information Act	5
B. Privacy Act of 1974	6
C. Computer Matching and Privacy Protection Act of 1988	7
PART II - DESCRIPTION OF FREEDOM OF INFORMATION ACT	9
A. Publication of Information About Policies and Procedures	9
B. Public Inspection and Copying of Specified Records	9
C. Public Inspection of All Other Records	10
D. Exceptions	10
E. Protection of Privacy	11
F. Indexes	11
G. Fees	11
H. Remedies	12
I. Reports to Congress	13

Page

PART III - DESCRIPTION OF PRIVACY ACT OF 1974 15

A. Records Covered 15

B. Exceptions 15

C. Notice and Opportunity to Comment 16

D. Record Collection 16

E. Instruction of Personnel and Other Safeguards 16

F. Record Maintenance 17

G. Disclosure 17

H. Disclosure Log 18

I. Individual Access and Opportunity to Challenge 18

J. Agency Rules: Notice of Disclosure, Procedures for Individual Access and Fees 19

K. Records on Exercise of First Amendment Rights Prohibited 20

L. Notice of Subpoenaed Records 20

M. Selling or Renting Lists 20

N. Social Security Numbers 20

O. Civil Remedies and Criminal Penalties 21

P. Government Contractors 22

Q. Reports 22

R. Privacy Protection Study Commission 22

PART IV - DESCRIPTION OF COMPUTER MATCHING AND PRIVACY PROTECTION ACT OF 1988 23

A. Records Covered 23

B. Exceptions 23

C. Matching Agreement Requirement and Contents 24

Page

D. Notices of Agreements 25

E. Term of Agreement 25

F. Verification 25

G. Opportunity to Contest 26

H. Limitations on Disclosure and Agreement Renewal 26

I. Data Integrity Boards 26

J. Cost-Benefit Analysis 27

K. Appeal of Disapproval 27

L. Reports 27

PART I

BACKGROUND; SUMMARY OF ACTS

This Part provides background information on the purposes of, or concerns which led to the enactment of, the Freedom of Information Act, the Privacy Act of 1974 and the Computer Matching and Privacy Protection Act of 1988. This Part also provides a brief summary of each of those Acts; the three Acts are described, in detail, in Parts II to IV of this Memorandum.

A. FREEDOM OF INFORMATION ACT

1. Background

The Freedom of Information Act was enacted, in 1966, for the specific purpose of opening up federal records to public scrutiny. Prior to the enactment of this Act, public access to federal records was governed by SEC. 3 of the Administrative Procedure Act [5 U.S.C. s. 1002], entitled "Public Information." However, rather than facilitating public access to governmental information, that Act had been used to deny access. Specifically used to deny access were provisions which allowed the denial of access to information involving any function of the United States requiring secrecy "in the public interest" or to any matter relating "solely to internal management of an agency." Also, access could be restricted to persons "properly and directly concerned" and could be withheld entirely "for good cause found." Under the prior law, there was no remedy available to a citizen who was wrongfully denied access to federal public records [U.S. Code Congressional and Administrative News, 1966, at pp. 2421 to 2422].

Examples of uses of the prior law to deny access to governmental records included a 1962 denial based on the "public interest" exception, by the National Science Foundation, of access to cost estimates submitted by unsuccessful contractors in connection with a multimillion dollar deep-sea study. The firm awarded the contract had not submitted the lowest bid. White House intervention reversed the agency's decision that it had authority to withhold this information "in the public interest." In 1961, the Navy used the "internal management of an agency" exception to withhold routine telephone directories. In 1959, the Postmaster General used the "persons properly and directly concerned" limitation to withhold the names and salaries of postal employes. The "good cause found" exception was, historically, used by regulatory boards and commissions to withhold their votes or the views of dissenting members [U.S. Code Congressional and Administrative News, 1966, at pp. 2422 to 2423].

2. The Act

The Freedom of Information Act eliminated the broad exceptions described above. Instead, the Act lists specific categories of information which may be exempted from disclosure. Unless records fall within one of the Act's exemptions, they must be promptly disclosed to any person who is interested in seeing them.

B. PRIVACY ACT OF 1974

1. Background

The Privacy Act of 1974 was enacted in response to concerns that an individual's opportunities for employment, insurance and credit, rights to due process and rights to other legal protections are endangered by the collection, maintenance, use and dissemination of personal information by federal agencies. Also, the enactment of this legislation recognized that use of computers and sophisticated information technology magnifies the potential for such harm.

Specifically, the Act was based on congressional findings that:

> (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
>
> (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operation of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use or dissemination of personal information;
>
> (3) the opportunities for an individual to secure employment, insurance and credit, and his right to due process and other legal protections are endangered by the misuse of certain information systems;
>
> (4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and
>
> (5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the

collection, maintenance, use, and dissemination of information by such agencies [SEC. 2, P.L. 93-579].

2. The Act

Generally, under the Privacy Act of 1974, no federal agency may disclose personally identifiable information except pursuant to a written request by, or with the written consent of, the individual to whom the record pertains, unless the disclosure is made to specified persons or for specified purposes. Also, the Act permits an individual to inspect and challenge the accuracy of records pertaining to him or her.

As might be expected, conflicts arise between the disclosure requirements of the Freedom of Information Act and the confidentiality requirements of the Privacy Act of 1974. Generally, these conflicts are resolved in favor of the Freedom of Information Act. Specifically, the Privacy Act of 1974 exempts from its provisions any disclosure required under the Freedom of Information Act. The Freedom of Information Act permits, but does not require, an agency to delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, administrative staff manual or instructions to staff to prevent a "clearly unwarranted invasion of personal privacy."

C. COMPUTER MATCHING AND PRIVACY PROTECTION ACT OF 1988

1. Background

Computer matching using federal records began in 1977 at the U.S. Department of Human Services with a program called Project Start. Then-Secretary Joseph Califano initiated the program to compare lists of welfare recipients in selected jurisdictions with federal payroll records. The assumption was that persons on the federal payroll would not be eligible for welfare payments. The purpose of the program was to reduce fraud, waste and abuse [U.S. Code Congressional and Administrative News, 1988, at pp. 3108 to 3109].

The Computer Matching and Privacy Protection Act of 1988 was enacted in response to such computerized matching of federal records. Public opinion polls had consistently shown that privacy was a significant and enduring concern of Americans and that approximately 1/2 of the public viewed computers as a threat to privacy. Americans had an even more negative view of centralized files and data banks: 78% believed that a master computer file would violate their privacy. An underlying issue with computer matching is the linkage of computers and the "de facto" creation of a national data bank [U.S. Code Congressional and Administrative News, 1988, at p. 3125].

Computerized matching of records also raises questions regarding the use of information for purposes other than those for which it was collected and the perpetuation of inaccurate information about individuals [see, Legal Protections of Privacy, Final Report to the Office of Telecommunications Policy, Executive Office of the President, Kent Greenwalt, 1975, at p. 51; and "New Privacy Threat Scene," American Bar Association and Journal, January 1, 1987, at p. 29].

2. The Act

The Computer Matching and Privacy Act of 1988 generally requires that federal records containing personally identifiable information may not be disclosed to another federal or nonfederal agency for use in a computer "matching program" except pursuant to a written agreement between the source agency and the recipient agency. Under the Act, a "matching program" means a computerized comparison of information for the purpose of establishing or verifying eligibility for a federal benefit program or recouping payments or delinquent debts under such programs. The written agreements must contain specified information, including the purpose, legal authority and justification for the matching program; procedures for verifying information produced in the matching program; and procedures for notifying individuals that information they provide may be subject to verification through matching programs.

PART II

DESCRIPTION OF FREEDOM OF INFORMATION ACT

This Part describes the provisions of the Freedom of Information Act, in detail. The Act applies to all federal records, unless the records are covered by one of the Act's exemptions.

A. PUBLICATION OF INFORMATION ABOUT POLICIES AND PROCEDURES

The Freedom of Information Act requires each federal agency in the executive branch to publish certain information about its procedures and policies in the Federal Register, including:

1. Descriptions of its organization and where, from whom and how the public may obtain agency decisions or other information, or make submittals or requests;

2. How the agency carries out its functions;

3. The agency's rules of procedure, descriptions of its forms or the places they may be obtained, and instructions relating to papers, reports, or examinations required by the agency; and

4. The agency's substantive rules, policy statements or interpretations of general applicability.

If an agency fails to publish any of the required items in the Federal Register, no person may be required to "resort to" the procedure, form or other item or "be adversely affected by" the requirement, interpretation, policy or other item that was not published, unless he or she had actual and timely notice of it [5 U.S.C. s. 552 (a) (1)].

B. PUBLIC INSPECTION AND COPYING OF SPECIFIED RECORDS

The Freedom of Information Act requires each federal agency, in accordance with its own published rules, to make all of the following available for public inspection and copying:

1. Final opinions, including concurring and dissenting opinions, and orders, made by the agency in the adjudication of cases.

2. Statements of policy and interpretations which have been adopted by the agency but not published in the Federal Register.

3. Administrative staff manuals and instructions to employes that affect a member of the public.

These materials need not be made available for public inspection and copying if they are promptly published and copies are offered for sale [5 U.S.C. s. 552 (a) (2)].

Requirements relating to the disclosure of federal government records other than those listed above are described under C, below. Records which are exempt from the Act are described under D, below.

C. PUBLIC INSPECTION OF ALL OTHER RECORDS

Each federal agency must also promptly make available any records not made available as described under A or B, above, upon any request for the records which (1) reasonably describes the records and (2) is made in accordance with published rules stating the time, place, fees and procedures to be followed in making the request [5 U.S.C. s. 552 (a) (3)].

D. EXCEPTIONS

The Freedom of Information Act does not apply to:

1. Matters specifically required by executive order to be kept secret in the interest of national defense or foreign policy.

2. Matters related solely to internal personnel rules and practices of an agency.

3. Matters specifically exempted from disclosure by other statutes.

4. Trade secrets and privileged or confidential commercial or financial information.

5. Inter-agency or intra-agency memoranda or letters which would not be available, by law, to a party other than an agency (e.g., a private party) in litigation with the agency.

6. Personnel, medical and similar files, if their disclosure would constitute a clearly unwarranted invasion of personal privacy.

7. Records and information compiled for law enforcement purposes, but only to the extent that the production of the record: (a) could reasonably be expected to interfere with enforcement proceedings; (b) would deprive a person of a right to a fair trial or impartial adjudication; (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (d) could reasonably be expected to disclose the identity of a confidential source; (e) would disclose techniques and procedures or certain guidelines for law enforcement investigations or prosecutions; or (f) could reasonably be expected to endanger the life or physical safety of any individual.

8. Matters contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

9. Geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record must be provided to the requester after deletion of portions which are exempt under these exceptions [5 U.S.C. s. 552 (b)].

E. PROTECTION OF PRIVACY

Under the Act, to the extent required to prevent a "clearly unwarranted invasion of personal privacy," an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, administrative staff manual or instructions to staff. However, in each case, the justification for the deletion must be explained fully, in writing [5 U.S.C. s. 552 (a) (2)].

F. INDEXES

The Freedom of Information Act requires each federal agency to maintain and make available for public inspection and copying current indexes identifying any matter issued, adopted or promulgated after July 4, 1967, which is required to be made available or published, as described under B, above.

No final order, opinion, statement of policy, interpretation, staff manual or staff instruction that affects a member of the public may be relied upon, used or cited as precedent by an agency against a party other than a federal agency unless (1) it has been indexed and either made available or published or (2) the party has actual and timely notice of its terms [5 U.S.C. s. 552 (a) (2)].

G. FEES

Each federal agency must promulgate regulations which specify the agency's schedule of fees for processing requests and establish procedures and guidelines for determining when the fees should be waived or reduced. The schedule must conform to guidelines promulgated by the Office of Management and Budget, which must provide a uniform schedule of fees for all agencies. The agency's regulations must provide fees that meet the following criteria:

1. When records are requested for commercial use, fees shall be limited to reasonable standard charges for document search, duplication

and review. Review costs include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the document must be disclosed and whether any portions are exempt from disclosure. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing the request.

2. When records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, or the request is made by a representative of the news media, fees shall be limited to reasonable standard charges for document duplication.

3. For any other request, fees shall be limited to reasonable standard charges for document search and duplication.

Documents must be furnished without any charge or at a reduced charge if disclosure is in the "public interest" because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

The Act provides that no fees may be charged if the costs of the routine collection and processing of the fee are likely to equal or exceed the maximum amount of the fee. Also, no fees may be charged for noncommercial requests for the first two hours of search time or the first 100 pages of duplication. Advance payment of fees may not be required, unless the requester has previously failed to pay fees in a timely fashion or the fee will exceed $250 [5 U.S.C. s. 552 (a) (4) (A)].

H. REMEDIES

The Act gives federal district courts jurisdiction to enjoin an agency from withholding its records or to order the production of agency records improperly withheld from the complainant. The court may assess, against the United States, reasonable attorneys fees and other litigation costs reasonably incurred in any such case in which the complainant substantially prevails [5 U.S.C. s. 552 (a) (4) (B) and (E)].

If the court also issues a written finding that the circumstances surrounding the withholding of information raise questions regarding whether agency personnel acted "arbitrarily or capriciously," proceedings shall be initiated to determine whether disciplinary action is warranted against the officer or employe who was primarily responsible for the withholding [5 U.S.C. s. 552 (a) (4) (F)].

Contempt procedures may be brought against employes who do not comply with court orders to disclose information [5 U.S.C. s. 552 (a) (4) (G)].

The Act sets forth time periods within which an agency must respond to a public information request (generally within 10 days after receipt of the request) and make a determination on an appeal of a denial of a request (generally within 10 days after receipt of the appeal). If, on appeal, a denial is upheld, in whole or in part, the agency must notify the person making the request of the provisions for judicial review of the determination [5 U.S.C. s. 552 (a) (6)].

I. REPORTS TO CONGRESS

The Freedom of Information Act requires each federal agency to submit an annual report to the Speaker of the House of Representatives and the President of the Senate for referral to the appropriate committees of Congress. The report must set forth detailed information about denials of requests for records, including: (1) the number of denials and the reasons for the denials; (2) the number of appeals of denials, the results of those appeals and, for each appeal that upheld a denial, the reason for that decision; and (3) the names and titles or positions of each person responsible for a denial and the number of instances of participation in a denial for each such person.

The report must also include: (1) the results of each disciplinary proceeding initiated as a result of a court finding that a denial of access was "arbitrary and capricious"; (2) a copy of every rule made by the agency regarding the Freedom of Information Act; (3) a copy of the agency's fee schedule and the total amount of fees collected for making records available; and (4) other information that indicates "efforts to administer fully" the Freedom of Information Act.

In addition, the U.S. Attorney General must submit, to Congress, an annual report which includes: (1) the number of cases arising under the Freedom of Information Act; (2) the exemption involved in each case; (3) the disposition of the case; and (4) the costs, fees and penalties assessed under the Act. The report must also include a description of the efforts undertaken by the U.S. Department of Justice to encourage agency compliance [5 U.S.C. s. 552 (e)].

PART III

DESCRIPTION OF PRIVACY ACT OF 1974

This Part describes the provisions of the Privacy Act of 1974, in detail.

A. RECORDS COVERED

The Federal Privacy Act of 1974 applies to personally identifiable information. Specifically, the Act applies to records contained in a "system of records." The term "system of records" means any group of records under the control of any federal agency from which information is retrieved by the name of an individual or by a number, symbol or other identifying particular assigned to the individual [5 U.S.C. s. 552a (a) (1), (4) and (5)].

B. EXCEPTIONS

The Act allows the head of any federal agency to promulgate regulations exempting the following specified types of information from certain provisions of the Act:

1. Materials maintained by the Central Intelligence Agency.

2. Materials specifically authorized, by executive order, to be kept secret in the interest of national defense or foreign policy.

3. Certain law enforcement investigatory materials.

4. Materials related to providing protective services to the President of the United States or other individuals.

5. Materials required by statute to be maintained and used solely as statistical records.

6. Investigatory materials compiled solely for the purpose of determining suitability and eligibility for federal civilian employment, military service, federal contracts or access to classified information.

7. Tests or examinations used solely to determine qualifications for appointment or promotion in the federal service, if the disclosure of the information would compromise the objectivity or fairness of the test or examination.

8. Evaluation materials used to determine potential for promotion in the armed services [5 U.S.C. s. 552a (j) and (k)].

C. NOTICE AND OPPORTUNITY TO COMMENT

The Act requires each agency to publish in the Federal Register, upon establishment or revision, a notice describing its record systems containing personally identifiable information and its access policies and procedures.

Among other things, this notice must include each "routine use" of the records, including the categories of users and the purpose of the use. At least 30 days prior to the publication of this routine use information, the agency must publish, in the Federal Register, notice of any new or intended use of the record system and provide an opportunity for interested persons to submit written data, views or arguments to the agency [5 U.S.C. s. 552a (e) (4) and (11)].

D. RECORD COLLECTION

The Act states that each agency that maintains a system of records shall maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency which is required to be accomplished by statute or executive order [5 U.S.C. s. 552a (e) (1)].

When information about an individual maintained by an agency may result in adverse determinations about the individual's rights, benefits or privileges under federal programs, the agency maintaining the information must collect it, to the greatest extent possible, from the individual [5 U.S.C. s. 552a (e) (2)].

Also, the agency must inform each individual whom it asks to supply information, either on the form it uses to collect the information or on a separate form that the individual can keep, of: (1) the agency's authority to solicit the information and whether its disclosure is mandatory or voluntary; (2) the principal purposes for which the information is intended to be used; (3) the routine uses which may be made of the information; and (4) the effects on the individual of not providing any or all of the information [5 U.S.C. s. 552a (e) (3)].

E. INSTRUCTION OF PERSONNEL AND OTHER SAFEGUARDS

The Act requires each agency that maintains a system of records to establish rules of conduct for persons involved in the design, development, operation or maintenance of any system of records or maintenance of records and instruct those persons regarding the applicable laws, rules, procedures and penalties for noncompliance [5 U.S.C. s. 552a (e) (9)].

The agency must also establish appropriate administrative, technical and physical safeguards to ensure the security and confidentiality of such records and to protect against anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience or unfairness to any individual on whom information is maintained [5 U.S.C. s. 552a (e) (10)].

F. RECORD MAINTENANCE

The Act requires each agency that maintains a system of records to maintain the records it uses in making determinations about individuals with such accuracy, relevance, timeliness and completeness as is "reasonably necessary to assure fairness" to the individual in making the determination [5 U.S.C. s. 552a (e) (5)].

G. DISCLOSURE

The Act provides that no federal agency may disclose any personally identifiable record from a system of records, except pursuant to written request by, or with the written consent of, the individual to whom the record pertains, unless the disclosure is:

1. To officers or employes of the agency which maintains the records who have a need for the record in the performance of their duties.

2. Required under the Freedom of Information Act.

3. For a "routine use." The Act defines "routine use" as the use of a record for a purpose which is "compatible with the purpose for which it was collected."

4. To the Bureau of Census for the purposes of planning or carrying out a census or survey.

5. For statistical research or reporting, if the record is transmitted in a form which is not personally identifiable.

6. To the National Archives and Records Administration if the record has sufficient historical or other value to warrant its preservation by the U.S. Government or for evaluation to determine whether it does.

7. For a civil or criminal law enforcement activity, pursuant to a written request specifying the particular portion of the record desired and the law enforcement activity for which the record is sought.

8. To any person, pursuant to a showing of a compelling circumstance affecting the health or safety of an individual.

9. To either house of Congress or a committee or subcommittee thereof.

10. To the Comptroller General in the performance of the duties of the General Accounting Office.

11. Pursuant to a court order.

12. To a consumer reporting agency for the purpose of collecting a tax claim of the U.S. Government, if procedures specified under 31 U.S.C. s. 3771 (f) are followed. A consumer reporting agency to which a record is disclosed under this provision is considered a contractor for the purpose described under P, below [5 U.S.C. s. 552a (b) and (m) (2)].

The Act also provides that, unless the dissemination is required under the Freedom of Information Act, prior to disseminating any records about any individual to any person, other than a federal agency, the agency must "make reasonable efforts" to assure that the records are accurate, complete, timely and relevant "for agency purposes" [5 U.S.C. s. 552a (e) (6)].

H. DISCLOSURE LOG

Each agency must keep a record of the date, nature and purpose of each disclosure of personally identifiable records, except those disclosures made to officers or employes of the agency who have a need for the record or disclosures made pursuant to the Freedom of Information Act. This record must be maintained for at least five years or for the life of the record, whichever is longer.

Except for disclosures made for the purposes of civil or criminal law enforcement, the agency must make the record of the disclosure available to the individual named in the record, at the request of the individual.

If a record of a disclosure is kept, as just described, an agency must inform any person or agency to whom the recorded disclosure was made about any correction or notation of dispute made by the agency, as described under I, below [5 U.S.C. s. 552a (c) (1) to (4)]. There is no obligation to inform persons to whom the record disclosure was made about any correction or dispute if the disclosure to the person was not required to be recorded.

I. INDIVIDUAL ACCESS AND OPPORTUNITY TO CHALLENGE

Every agency that maintains a system of personally identifiable records must permit an individual, or a person of his or her choosing, to gain access to any information in those records pertaining to the individual. The agency must allow the individual, or person selected by

the individual, to review the records, copy them and challenge their accuracy [5 U.S.C. s. 552a (d) (1)].

A federal agency may not rely on any exemption from the disclosure requirements of the Freedom of Information Act to withhold a record otherwise accessible to an individual under the Privacy Act of 1974 [5 U.S.C. s. 552a (t)].

If an individual requests amendment of a record pertaining to him or her, the agency must either promptly make the requested correction or inform the individual of its refusal, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal and the name and business address of the official who will conduct the review. The reviewing official must be the head of the agency or other official designated by the head of the agency.

If the reviewing official refuses to amend the record, the agency must permit the individual to file with the agency a concise statement setting forth the reasons for his or her disagreement with the refusal and must also notify the individual of the provisions for judicial review of the reviewing official's determination. Thereafter, in any disclosure containing information about which an individual has filed a statement of disagreement, the agency must clearly note any portion of the record which is disputed and provide copies of the individual's statement. If the agency deems it appropriate, copies of a concise statement of its reasons for not making the requested amendments may also be provided [5 U.S.C. s. 552a (d) (2) to (4)].

An agency may deny an individual access to personally identifiable information compiled in reasonable anticipation of a civil action or proceeding [5 U.S.C. s. 552a (d) (5)].

J. AGENCY RULES: NOTICE OF DISCLOSURE, PROCEDURES FOR INDIVIDUAL ACCESS AND FEES

Under the Act, each federal agency that maintains a system of records must promulgate regulations which:

1. Establish procedures whereby an individual can be notified, if he or she so requests, that a system of records organized by individual names contains a record pertaining to him or her.

2. Define reasonable times, places and requirements for identifying an individual who requests records or information pertaining to him or her before the agency makes the records or information available to the individual.

3. Establish procedures for the disclosure to an individual, upon his or her request, of a record or information pertaining to him or her,

including special procedures, if necessary, for the disclosure of medical records.

4. Establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to him or her, for making a determination on that request, for an appeal within the agency of an initial determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his or her rights under the Act.

5. Establish fees, if any, to be charged to an individual for making copies of his or her records, excluding the costs of any search for, or review of, the record.

The regulations just described and the agency notices described under C, above, must be annually compiled and published, and made available to the public at low cost, by the Office of the Federal Register [5 U.S.C. s. 552a (f)].

K. RECORDS ON EXERCISE OF FIRST AMENDMENT RIGHTS PROHIBITED

The Act prohibits any federal agency from keeping records describing how an individual exercises rights guaranteed by the First Amendment of the U.S. Constitution, unless expressly authorized by statute or unless pertinent to, and within the scope of, an authorized law enforcement activity [5 U.S.C. s. 552a (e) (7)].

L. NOTICE OF SUBPOENAED RECORDS

The Act requires each federal agency to make reasonable efforts to notify an individual that information about him or her has been made available under legal process (e.g., subpoena) as soon as such process becomes a matter of public record [5 U.S.C. s. 552a (e) (8)].

M. SELLING OR RENTING LISTS

The Act prohibits federal agencies from selling or renting an individual's name and address, unless specifically authorized by law [5 U.S.C. s. 552a (n)].

N. SOCIAL SECURITY NUMBERS

The Act prohibits any state, federal or local government agency from denying an individual any right, benefit or privilege because of the individual's refusal to disclose his or her Social Security number, unless the disclosure is required by federal law, or was required under a

federal, state or local statute adopted before January 1, 1975. Exceptions allow any state or political subdivision thereof to require Social Security numbers for identification purposes in the administration of any tax, general public assistance, driver's license or motor vehicle registration law, or in conjunction with a blood donation facility, without regard to the January 1, 1975 deadline [42 U.S.C. s. 405 (2) (C) (i) and (iii) and (D)].

Any federal, state or local agency which requests an individual to disclose his or her Social Security number must inform the individual whether disclosure is mandatory or voluntary, by what statutory or authority the number is being solicited and what uses will be made of it [SEC. 7, P.L. 93-579; see the note following 5 U.S.C. s. 552a].

O. CIVIL REMEDIES AND CRIMINAL PENALTIES

The Act permits an individual to bring a civil lawsuit to require an agency to:

1. Provide the individual access to his or her records; or

2. Require an agency to amend those records in accordance with the individual's request.

In any such action in which the complainant substantially prevails, the court may assess attorneys fees and litigation costs against the United States.

An individual may also bring a civil lawsuit against an agency which:

1. Fails to maintain a record about the individual with such accuracy, relevance, timeliness and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights or opportunities of, or benefits to, the individual if, as a consequence of the failure, a determination adverse to the individual is made; or

2. Fails to comply with any other provision of the Act or rule promulgated under the Act in such a way as to have an adverse effect on the individual.

If the agency acted in a wilful or intentional manner with regard to either of these matters, actual damages sustained by the individual as a result of the failure, litigation costs and attorneys fees shall be awarded to the individual. In no case shall a person who is entitled to actual damages be awarded less than $1,000 for those damages [5 U.S.C. s. 552a (g)].

Agency employes who wilfully disclose information in violation of the Act or maintain records without complying with the Act, and any person who wilfully requests or obtains information concerning an individual under false pretenses, are guilty of a criminal misdemeanor punishable by a fine of not more than $5,000 [5 U.S.C. s. 552a (i)].

P. GOVERNMENT CONTRACTORS

If an agency contracts for the operation of a system of records to accomplish agency functions, it must "cause the requirements" of the Privacy Act to be applied to the system. For the purpose of the Act, the contractor and its employes shall be considered to be employes of the agency [5 U.S.C. s. 552a (m) (1)].

Q. REPORTS

See the description of the report to Congress under Part IV, L, below.

R. PRIVACY PROTECTION STUDY COMMISSION

Finally, the Act created the Privacy Protection Study Commission and charged it with studying both public and private recordkeeping programs and policies and recommending further legislation to Congress and the President [SEC. 5, P.L. 93-579; see the note following 5 U.S.C. s. 552a]. This Commission made its report in 1977.

PART IV

DESCRIPTION OF COMPUTER MATCHING AND PRIVACY PROTECTION ACT OF 1988

This Part describes the provisions of the Computer Matching and Privacy Protection Act of 1988, in detail.

A. RECORDS COVERED

The Computer Matching and Privacy Protection Act of 1988 regulates computer matching conducted by federal agencies or using federal records subject to the Federal Privacy Act of 1974. Records subject to that Act are those contained in a "system of records" from which information is retrieved by a number, symbol or other identifying particular assigned to an individual (i.e., personally identifiable information).

The Act defines a "matching program" to mean the computerized comparison of two or more federal automated systems of personally identifiable records or the comparison of a federal system of such records with nonfederal records for the purpose of:

1. Establishing or verifying eligibility for a federal benefit program; or

2. Recouping payments or delinquent debts under such programs.

A "matching program" also includes the computerized comparison of two or more automated federal personnel or payroll systems of records or the comparison of such a federal system of records with nonfederal records [5 U.S.C. s. 552a (a) (8) (A)].

B. EXCEPTIONS

Computer matches performed for statistical, research, law enforcement, tax, foreign counterintelligence or security clearance purposes are not subject to the Act.

Also excluded from the Act are computerized matches: (1) using records predominately related to federal personnel that are performed for "routine administrative purposes," subject to guidance provided by the Director of the Office of Management and Budget; or (2) conducted by an agency using only records from systems of records maintained by that agency. In both of these cases, the purpose of the match must not be to take any adverse financial, personnel, disciplinary or other adverse action against federal personnel [5 U.S.C. s. 552a (a) (8) (B)].

C. MATCHING AGREEMENT REQUIREMENT AND CONTENTS

The Act provides that records subject to the Act may not be disclosed to another federal agency or a nonfederal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient federal agency or nonfederal agency. The agreement must specify:

1. The purpose and legal authority for conducting the program.

2. The justification for the program and the anticipated results, including a specific estimate of any savings.

3. A description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched and the projected starting and completion dates of the matching program.

4. Procedures for providing individualized notice to the following individuals that any information provided by them may be subject to verification through matching programs (a) applicants for and recipients of financial assistance or payments under federal benefit programs and (b) applicants for and holders of federal positions. This notice must be provided upon application and periodically thereafter, as directed by the Data Integrity Board of the agency, subject to guidance provided by the Director of the Office of Management and Budget. [The Data Integrity Board is described under I, below.]

5. Procedures for verifying information produced in the matching program, as described under F, below.

6. Procedures for the retention and timely destruction of identifiable records created by the recipient federal or nonfederal agency.

7. Procedures for ensuring the administrative, technical and physical security of the records matched and the results of such programs.

8. Prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient federal or nonfederal agency, except where required by law or essential to the conduct of the matching program.

9. Procedures governing the use by the recipient federal or nonfederal agency of records provided in the matching program, including procedures governing return of the records to the source agency or destruction of the records.

10. Information on assessments that have been made of the accuracy of the records that will be used in the matching program.

11. That the Comptroller General may have access to all records of a recipient federal or nonfederal agency as deemed necessary by the Comptroller General to monitor or verify compliance with the agreement [5 U.S.C. s. 552a (o) (1)].

D. NOTICES OF AGREEMENTS

Thirty days prior to its effective date, a copy of each agreement must be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives and a copy of the agreement must be available, upon request, to the public [5 U.S.C. s. 552a (o) (2) (A) and (B)].

Also, any federal agency which is a recipient agency or a source agency in a matching program with a nonfederal agency must publish notice of the establishment or revision of a computer matching program in the Federal Register at least 30 days prior to conducting the program [5 U.S.C. s. 552a (e) (12)].

E. TERM OF AGREEMENT

Matching agreements shall remain in effect only for the period, not to exceed 18 months, that the Data Integrity Board of the agency determines is appropriate in light of the purposes and length of time necessary for the matching program. Within three months prior to the expiration of the agreement, the Data Integrity Board may, without additional review, renew the matching agreement for not more than one additional year if (1) the program will be conducted without any change and (2) each party to the agreement certifies to the Board, in writing, that the program has been conducted in compliance with the agreement [5 U.S.C. s. 552a (o) (2) (C) and (D)].

F. VERIFICATION

The Act provides that information produced by matching programs must be independently verified by the recipient federal or nonfederal agency or by the source agency before that agency may suspend, terminate, reduce or make a final denial of any financial assistance or payment under a federal benefit program or take other adverse action against an individual based on the information.

Independent verification requires independent investigation and confirmation of any information used as a basis for an adverse action,

including, where applicable, independent verification of: (1) the amount of the asset or income involved; (2) whether the individual actually has or had access to the asset or income for the individual's own use; and (3) the period or periods when the individual actually had the asset or income [5 U.S.C. s. 552a (p) (1) and (2)].

G. OPPORTUNITY TO CONTEST

Under the Act, no adverse action may be taken against an individual as the result of information produced by a matching program unless (1) the individual has received notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest those findings and (2) any period of notice provided by the program's law or regulations or 30 days, whichever is later, has expired. The agency may, however, take appropriate action if it determines that the public health or public safety would be adversely affected or significantly threatened during the notice period [5 U.S.C. s. 552a (p) (3) and (4)].

H. LIMITATIONS ON DISCLOSURE AND AGREEMENT RENEWAL

No source agency may disclose any record to a recipient federal or nonfederal agency if the source agency has reason to believe the requirements relating to verification, described under F, above, or the requirements of any matching agreement, described under C, above, are not being met by the recipient agency.

No source agency may renew a matching agreement unless the recipient agency certified that it has complied with the agreement and the source agency has no reason to believe that the certification is inaccurate [5 U.S.C. s. 552a (q)].

I. DATA INTEGRITY BOARDS

The Act requires each federal agency involved in a matching program to establish a Data Integrity Board composed of "senior officials" of the agency. The Board must:

1. Review, approve and maintain all matching agreements to determine compliance with the applicable laws and agreements and to assess the costs and benefits of the programs [see J, below].

2. Review all recurring matching programs in which the agency participates for continued justification.

3. Compile an annual report describing the agency's matching activities. The report must be submitted to the head of the agency and the Federal Office of Management and Budget.

4. Serve as a clearinghouse for receiving and providing information on the accuracy, completeness and reliability of records used in matching programs.

5. Provide interpretation and guidance on the requirements of the law to agency personnel.

6. Review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with the law [5 U.S.C. s. 552a (u) (1) to (3)].

J. COST-BENEFIT ANALYSIS

A Data Integrity Board may not approve any written agreement for a matching program unless the agency has completed and submitted to the Board a cost-benefit analysis of the proposed program and the analysis demonstrates that the program is likely to be cost-effective. This requirement may be waived by the Data Integrity Board if it determines, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

Also, a cost-benefit analysis is not required prior to the initial approval of a matching program agreement that is specifically required by statute. However, a cost-benefit analysis is required for subsequent approval [5 U.S.C. s. 552a (u) (4)].

K. APPEAL OF DISAPPROVAL

If a matching agreement is disapproved by a Data Integrity Board, any party to the agreement may appeal the disapproval to the Director of the Office of Management and Budget. The Director may approve a matching agreement, notwithstanding the disapproval of a Data Integrity Board, if the Director determines that the matching program will be consistent with all applicable legal, regulatory and policy requirements; there is adequate evidence that the matching agreement will be cost-effective; and the matching program is in the public interest [5 U.S.C. s. 552a (u) (5)].

L. REPORTS

Each agency that proposes to establish or make a significant change in a system of records or a matching program must provide adequate notice of the proposal to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate and the Office of Management and Budget. The purpose of the notice is to permit an evaluation of the probable or potential effect of the proposal on privacy or other rights of individuals [5 U.S.C. s. 552a (r)].

Also, the President must biennially submit a report to the Speaker of the House of Representatives and the President Pro Tempore of the Senate which describes the actions, during the preceding two years, of the Director of the Office of Management and Budget under the Privacy Act of 1974; describes the exercise of individual rights of access and amendment, during the preceding two years under the Privacy Act of 1974 and the Computer Matching and Privacy Protection Act of 1988; identifies changes in or additions to systems or records; and contains such other information concerning the administration of those Acts as may be necessary or useful to Congress in reviewing the Act's effectiveness [5 U.S.C. s. 552a (s)].

JRH:all:kja;wu